Office - Supreme Court, U.S.
FILED
MAY 6 1985
STEVAS,
CLERK

No. 84-773 (19)

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, ET AL., PETITIONERS

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CHARLES FRIED
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

36 pp

QUESTION PRESENTED

Whether a public high school violates the Establishment Clause if it permits a voluntary student religious club to meet on school property during a student activities period in which all other voluntary student groups are permitted to meet.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Introduction and summary of argument	7
Argument:	
The Establishment Clause does not require public school authorities to exclude a voluntary, student-initiated and student-run religious club from an activities period during which other student groups are permitted to meet	10
A. The Establishment Clause does not authorize the government to single out religious speech and association for direct discriminatory prohibition	12
B. The presumed greater impressionability of high school students is not a basis for permitting discrimination against religious speech	16
C. There is no other basis for distinguishing this Court's decision in *Widmar* v. *Vincent*	23
1. Compulsory attendance laws	23
2. Location of the meetings	24
3. Presence of adult monitor	26
4. Excessive entanglement	27
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Abington School District v. *Schempp*, 374 U.S. 203	28
Amadei v. *Spring Branch Independent School District*, No. H-84-4673 (S.D. Tex. Apr. 26, 1984)	16
Bayer v. *Kinzler*, 383 F. Supp. 1164, aff'd, 515 F.2d 504	20
Bell v. *Little Axe Independent School District No. 70*, No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), appeal docketed, No. 83-1458 (10th Cir. Apr. 5, 1983)	16

Cases—Continued: Page

Board of Education v. *Pico*, 457 U.S. 853 19
Brandon v. *Board of Education*, 635 F.2d 971, cert. denied, 454 U.S. 1123 ..... 16, 22, 27
Brotherhood of Locomotive Firemen & Enginemen v. *Chicago, R.I. & Pac. R.R.*, 393 U.S. 129 18
Cantwell v. *Connecticut*, 310 U.S. 296 ..... 8, 13, 27
Collins v. *Chandler Unified School Dist.*, 644 F.2d 759, cert. denied, 454 U.S. 863 24
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 19
Estate of Thornton v. *Caldor, Inc.*, cert. granted, No. 83-1158 (Mar. 5, 1984) 14
Gambino v. *Fairfax County School Board*, 429 F. Supp. 731, aff'd, 564 F.2d 157 20
Gillette v. *United States*, 401 U.S. 437 14
Goodwin v. *Cross County School Dist. No. 7*, 394 F. Supp. 417 24
Healy v. *James*, 408 U.S. 169 13
Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 14
Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203 ..... 25, 26
James v. *Board of Education*, 461 F.2d 566, cert. denied, 409 U.S. 1042 20
Johnson v. *Huntington Beach Union High School Dist.*, 63 Cal. App. 3d 1, 137 Cal. Rptr. 43 27
Katzenbach v. *McClung*, 379 U.S. 294 19
Katzenbach v. *Morgan*, 384 U.S. 641 18-19
Lubbock Civil Liberties Union v. *Lubbock Independent School District*, 669 F.2d 1038, cert. denied, 459 U.S. 1155 16
Lynch v. *Donnelly*, No. 82-1256 (Mar. 5, 1984) 13, 14
Martin v. *City of Struthers*, 319 U.S. 141 13
McCreary v. *Stone*, 739 F.2d 716, aff'd, No. 84-277 (Mar. 27, 1985) 14
McDaniel v. *Paty*, 435 U.S. 618 ..... 14, 15
Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 456 18
Murdock v. *Pennsylvania*, 319 U.S. 105 ..... 8, 13, 14
Nartowicz v. *Clayton County School District*, 736 F.2d 646 ..... 16, 27

Cases—Continued: Page

Niemotko v. *Maryland*, 340 U.S. 268 ..... 14, 15
O'Hair v. *Andrus*, 613 F.2d 931 14
Oregon v. *Mitchell*, 400 U.S. 112 19
Police Dep't v. *Mosley*, 408 U.S. 92 ..... 11, 12
Reed v. *Van Hoven*, 237 F. Supp. 48 16
Rostker v. *Goldberg*, 453 U.S. 57 18
Russo v. *Central School District No. 1*, 469 F.2d 623, cert. denied, 411 U.S. 932 19
Seyfried v. *Walton*, 668 F.2d 214 19
Shanley v. *Northeast Indep. School Dist.*, 462 F.2d 960 20
Texaco, Inc. v. *Short*, 454 U.S. 516 18
Thomas v. *Review Board*, 450 U.S. 707 ..... 8, 14
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 19
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 14
United States v. *O'Brien*, 391 U.S. 367 8
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 13
Wallace v. *Jaffree*, prob. juris noted, No. 83-812 (Apr. 2, 1984) 14
Walz v. *Tax Commission*, 397 U.S. 664 ..... 27, 28
Widmar v. *Vincent*, 454 U.S. 263 ..... *passim*
Witters v. *Washington Comm'n for the Blind*, cert. granted, No. 84-1070 (Apr. 1, 1985) 14
Zorach v. *Clauson*, 343 U.S. 306 ..... 14, 23, 24

Constitution and statute:

U.S. Const. Amend. I ..... *passim*
Establishment Clause ..... *passim*
Free Exercise Clause 8, 9, 13, 15
Free Speech Clause 13
Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.* 1, 6
§ 802, 98 Stat. 1302 7
§ 802(a), 98 Stat. 1302 11
§ 803, 98 Stat. 1303 ..... 2, 7
§ 803(4), 98 Stat. 1303 2

Miscellaneous: Page

American Ass'n of School Administrators, *Equal Access: Interpretation and Implementation Guidelines* (1984) 2

1 Annals of Congress (Aug. 15, 1789) (J. Gales ed. 1834):

p. 757 15
p. 758 15
pp. 758-759 15

130 Cong. Rec. (daily ed. June 27, 1984):

p. S8354 2
p. S8355 28
pp. S8355-S8356 2

130 Cong. Rec. (daily ed. July 25, 1984):

p. H7724 18
p. H7727 18
pp. H7735-H7736 2

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) 17, 18, 22

Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 98th Cong., 1st Sess. (1983) 18

H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984) 6, 11, 12

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978) 15

Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983) 18

69 Op. Md. Att'y Gen. No. 84-031 (Dec. 6, 1984) 2

Religious Speech Protection Act: Hearing Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 98th Cong., 2d Sess. (1984) 20

S. Rep. 98-357, 98th Cong., 2d Sess. (1984) 6, 11, 12, 17, 21

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The question in this case is whether the First Amendment requires a public high school to exclude a voluntary student religious club from meeting on school property during a student activities period in which all other voluntary student groups are permitted to meet. The interest of the United States arises from recent congressional legislation addressing this issue.

After extensive hearings and debate, the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*) (set forth in full at Pet. App. 113a-115a) was passed by the Congress and signed by the President on August 11, 1984. The Act makes it unlawful for any public secondary school receiving federal aid and having a "limited open forum" to deny access to students who wish to conduct a meeting, on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." See pages 6-7, *infra*. The court of appeals, in contrast, held that for a public high school

to allow a voluntary religious club to meet on school premises during a student activities period would violate the Establishment Clause. If allowed to stand, the decision of the court of appeals would thus cast doubt on the constitutionality of the Equal Access Act.[1] While the constitutional holding of the court of appeals might be limited to meetings conducted during the hours of compulsory school attendance (see Pet. App. 28a, 43a), the reasoning of the court on the central question—whether high school students are capable of distinguishing between a neutral forum and official endorsement of religion—would be difficult so to confine.[2] Thus, although this case was brought (and the decision below rendered) before the Equal Access Act was enacted,[3] the court of appeals' reasoning

---

[1] One State Attorney General, in reliance on the decision below, has formally opined that the Equal Access Act is unconstitutional, and has, in effect, instructed State educational officials not to comply with it. 69 Op. Md. Att'y Gen. No. 84-031 (Dec. 6, 1984). The American Association of School Administrators has distributed guidelines for implementing the Equal Access Act, which are prefaced by the advice that states covered by the Third Circuit (among others) "could be out of compliance with previous circuit court rulings if they act to implement the law." American Ass'n of School Administrators, *Equal Access: Interpretation and Implementation Guidelines* 1 (1984). These examples demonstrate that the decision below is having a direct effect on implementation of the Act.

[2] The Equal Access Act applies only where the student activities occur "before actual classroom instruction begins or after actual classroom instruction ends" (§ 803(4), 98 Stat. 1303). This is not necessarily the same as the hours of compulsory school attendance, as this case illustrates. Where, as here, the limited open forum occurs at the beginning of the day (or after a brief opening homeroom during which no "actual classroom instruction" occurs), the plain language of the Act indicates that it would apply despite the fact that the activities period is covered by compulsory attendance laws. The legislative history, however, is ambiguous on this point. Compare 130 Cong. Rec. S8354 (daily ed. June 27, 1984) (remarks of Sens. Metzenbaum and Hatfield), with *id.* at S8355-S8356 (daily ed. June 27, 1984) (remarks of Sen. Denton); *id.* at H7735-H7736 (daily ed. July 25, 1984) (remarks of Rep. Bonker).

[3] This case provides no occasion for interpretation of the Equal Access Act. The free speech rights of petitioners recognized by

would suggest that implementation of the Act in most situations would be unconstitutional.

STATEMENT

1. Williamsport Area High School is located on a 147-acre campus, more than a mile from the nearest residence (J.A. 70). Most students are bused to the school (J.A. 68-69). The school day starts at 7:45 a.m., with a 12-minute homeroom period, during which attendance is taken and announcements made (J.A. 102).

On Tuesdays and Thursdays, the opening homeroom period is followed by a 30-minute period for extracurricular student activities (Pet. App. 69a n.5). During this time, students may attend student club meetings, study in the library, visit the computer station, examine career or college placement materials, or stay in their homerooms (*id.* at 7a-8a). The student clubs that meet during this activities period are entirely voluntary (*id.* at 8a). There is no written policy concerning what type of club may be allowed to meet. However, the principal stated that he would permit any lawful club that would "contribute to the intellectual, physical or social development of the students" (*id.* at 9a; J.A. 104). This principal has served since 1974; in his memory, no student club had ever been denied permission to meet, until this case (Pet. App. 8a; J.A. 102-104).

This case arose out of a request by students at the school to form a club for the purpose of meeting to read and discuss the Bible and to pray. The club (called "Petros") agreed not to publicize its meetings through the school's public address system, bulletin board, or newspaper. Pet. App. 33a. The club initially was allowed

---

both courts below are at least as broad as their rights under the Act. Only in the event that this Court should reverse the decision below on both free speech and establishment grounds—*i.e.*, hold that petitioners' free speech rights were not infringed but that to allow petitioners to meet would not violate the Establishment Clause—might it be necessary to determine, on remand, whether the Act applies to this case.

to meet during the activities period. The first meeting was attended by 45 students (out of a student body of 2,500). *Id.* at 4a-6a, 68a-71a; J.A. 53. In accordance with school policy, a teacher was present during the meeting, took attendance, and thereafter sat in the room grading papers (Pet. App. 9a-10a, 69a-70a). After the first meeting, the school superintendent obtained an opinion of counsel to the effect that allowing the club to meet on school property would violate the Establishment Clause. On this basis, the superintendent denied the club further permission to meet during the activities period. J.A. 39-40, 92-93. The students were offered the alternative of released time during which they could conduct their meetings away from school property. Pet. App. 71a-72a. While the record does not show why they declined this alternative, it was obviously impractical in view of the location of the school (over a mile from the nearest residence) and the brief duration of the activities period (30 minutes).

The superintendent's decision was affirmed by respondent School Board (Pet. App. 72a). The Board's action was based solely on advice of counsel that "[p]resent law simply does not permit public schools to authorize or support religious activities on school property" (*id.* at 6a; J.A. 48-49). The Board has never suggested any programmatic, disciplinary, or educational reason for excluding the group. The school principal specifically stated that he did not think the group would be disruptive. J.A. 84.

2. The students then brought this action for declaratory and injunctive relief against the School Board and its members, in both their individual and official capacities (J.A. 13). Relying on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the district court held that the high school had created a "limited public forum" by establishing an activities period open to any legitimate student activity, and rejected the Board's argument that allowing Petros to meet would violate the Establishment Clause. Since this

was the only rationale for the exclusion, the district court concluded that under the First Amendment this "content-based decision to exclude subject matter" could not stand. Pet. App. 81a-82a.[4]

After the district court decision, respondent School Board decided to comply with the decision and not to appeal. Respondent John C. Youngman, Jr., a member of the Board and parent of children attending Williamsport High School, appealed.[5] A divided panel of the court of appeals reversed. While agreeing that the school had created a limited public forum in its activities period, and thus that the students had a "valid first amendment interest to engage in their proposed activity" (Pet. App. 20a-21a), the court "balanc[ed] the respective constitutional interests [free speech and nonestablishment] which would be lost and gained if Petros were granted

---

[4] The district court acknowledged that if the activities period were part of the school's curriculum, the superintendent would have had wide discretion to limit subject matter as part of his power to define the curriculum. However, the court pointed out that the sole reason offered for excluding Petros was legal advice regarding the Establishment Clause; the superintendent never purported to be exercising his authority to define the curriculum. Pet. App. 82a-85a.

[5] After the briefs were filed in the court of appeals, respondent Youngman ceased to be a member of the School Board. As none of the parties disputes, however, there remains a case or controversy, since the student petitioners continue to desire to meet, and the School Board continues to refuse permission. That the School Board is a nonlitigating respondent (in effect, a disinterested "stakeholder") does not affect this, since the Board (by relying on the court of appeals' judgment as a basis for not complying with the district court's judgment against it and by resisting attorneys' fees) has in effect treated the appeal by respondent Youngman as its own. Having been sued in his individual as well as his official capacity, respondent Youngman has standing as appellant below and respondent herein to defend his interests as parent of children in the school; if he is correct on the merits, his children's right to attend public school free from unconstitutional religious influences would be infringed if petitioners were to prevail.

The matters were brought to the attention of the court of appeals (see Pet. for Reh'g 5 n.2), which implicitly held that the case remained justiciable.

access to the activity period" (*id.* at 42a), and concluded that "there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance" (*id.* at 43a).

As a result of the court of appeals' decision, the School Board has reverted to its former policy of denying the students the right to participate in the activities period (Pet. App. 109a-110a).

3. Within a few weeks after the court of appeals' decision, Congress passed the Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.* (see Pet. App. 113a-115a). The purpose of the Act was to "clarify and confirm" the First Amendment rights of high school students in this context, and thereby "resolve the dilemma" school administrators believed they faced in reconciling the assertedly conflicting demands of free speech and nonestablishment. S. Rep. 98-357, 98th Cong., 2d Sess. 3, 21 (1984). Supporters of the Act in Congress relied heavily on the district court decision in the instant case (*id.* at 7; H.R. Rep. 98-710, 98th Cong., 2d Sess. 3, 5 (1984)),[6] and the factual circumstances of this case were used as an example of the need for legislation (see, *e.g.*, *id.* at 5).

The Act prohibits public schools receiving federal financial assistance from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting" within a "limited open forum" established by the school, on the basis of "the religious, political, philosophical, or other content of the speech at such meetings." "Limited open forum" is defined as granting access for noncurriculum-related student groups to meet on school premises "during noninstructional time," which is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." The school is "deemed to offer a fair opportunity to students" if it pro-

[6] Congressional consideration of the Act was completed before the members of Congress became aware that the district court decision below was reversed by the court of appeals.

vides, on a uniform basis, that meetings be "voluntary and student-initiated"; that there be "no sponsorship of the meeting by the school"; that "employees or agents of the school or government [may be] present at religious meetings only in a nonparticipatory capacity"; and that "nonschool persons may not direct, conduct, control, or regularly attend" such meetings. §§ 802, 803, 98 Stat. 1302, 1303.

INTRODUCTION AND SUMMARY OF ARGUMENT

The premise of the decision below is that the various component freedoms protected by the First Amendment—free speech and nonestablishment most particularly, free exercise and free association by implication—are in conflict and require judicial "balancing." The court determined that petitioners' free speech rights are outweighed by the Establishment Clause. We submit that, properly viewed, these components of the First Amendment do not generate the conflict that so troubled the court below. If the scope and meaning of the clauses of the First Amendment are more precisely conceived, there is no need to "balance" the "competing interests protected by each constitutional provision" (Pet. App. 40a).

The guarantees of freedom of speech and free exercise of religion, though obviously not identical, fit together in an altogether coherent way. Much religious expression is also protected as free speech: religious discussion, teaching, and persuasion are protected both as speech and as exercise of religion. To hold otherwise would invite an inadmissible distinction in terms of the contents of the expression. It would be strange indeed if because religious expression is doubly protected by the constitutional text it should therefore be less protected in practice. Prayer, whether individual or group prayer, is no less speech merely because the speakers may speak together, and surely not because those praying may believe that as they speak together they speak also to God.[7] Even

[7] This Court's school prayer decisions did not depend on a finding that prayer is not protected speech, but on the conclusion that the

religious ceremonials—so long as they are confined to speech, song, or gesture—must be indistinguishable in the eyes of the state from other forms of protected expression. As speech, religious expression is as protected as—and has no need to be more protected than—other forms of expression.

It is when religious practice travels beyond speech to action that the additional protections of the Free Exercise Clause come into play. While that travelling beyond speech opens the door for government regulation (*United States* v. *O'Brien*, 391 U.S. 367 (1968); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940)), it is likewise in that context that the Free Exercise Clause offers special and additional protection to religious action. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

The Establishment Clause is a consistent and harmonious element in this scheme. The Establishment Clause forbids governmental endorsement of any or all religions and forbids as well the exercise of government authority to implicate unwilling citizens in religious practice. It thus helps to preserve free exercise and free speech by guaranteeing to the individual the choice of the religious faith (if any) he will observe and to which he will lend his voice. Insofar as the Free Exercise Clause and legislative religious accommodations go beyond mere neutral protection of speech to provide special protection for the liberty of religious exercise, the Establishment Clause serves to ensure that the government does not go beyond accommodation to endorsement, religious favoritism, or subtle coercion. Even in cases of accommodation, however, there is no necessary conflict or inconsistency between the two Religion Clauses. An inherent conflict between the two Religion Clauses exists only on the extreme and unnecessary premise that to leave an extra measure of freedom to religious exercise constitutes an endorse-

---

state acts unconstitutionally if it endorses a particular religious exercise by incorporating it as part of the official activity of the classroom.

ment of religion or that to relieve burdens on religious exercise implicates other citizens in its exercise.

The instant case, far from presenting the agonizing dilemma felt by the court below, does not even approach the boundaries of the constitutional categories we have set out. This is not a case where government is being asked to accommodate religion to the point that unwilling citizens are in danger of being implicated in the practices of others. It is not even a case where the special solicitude for religion mandated by the Free Exercise Clause is brought into play. In this case, exactly, as in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the exercise of religion is no more than the exercise of the freedom of speech: it requires no special protection beyond that accorded all legitimate expression, and certainly warrants no less.

Widmar v. *Vincent*, *supra*, thus provides the appropriate precedential backdrop for this case. In *Widmar*, this Court held that a state university could not, consistent with the First Amendment, deny permission for a voluntary student group to use university facilities for its meetings solely on the basis of their religious content, where those facilities were made available to other student groups. The decision below distinguishes *Widmar* on the ground that high school students are less capable than college students of understanding that permission for a religious group to meet would not constitute state endorsement of religion. There is no basis for this distinction. Congress has found, on detailed inquiry of students, educators, and psychologists, that high school students are capable of understanding that neutral treatment of religious groups does not imply state endorsement. Moreover, decisions of this Court and lower courts holding that secondary school students have a First Amendment right to engage in speech on controversial topics presuppose that students are capable of learning from exposure to diverse viewpoints, without believing that all viewpoints expressed represent official orthodoxy. Finally, if students were to assume that allowing religious meetings would imply offi-

cial endorsement of religion, then they would just as easily assume that prohibiting religious meetings (while allowing meetings with a secular content) implies official disapproval of religion—a result that is equally at variance with the Establishment Clause.

There is no other basis for distinguishing *Widmar* v. *Vincent, supra.* So long as attendance at the student meetings is completely voluntary, the fact that compulsory attendance laws require students to be on the school property does not mean that they are compelled to undergo religious exposure. Nor is there any evidence that a voluntary group in this high school (which has some 2,500 students) is any more conspicuous than a similar group in a college of comparable size. Finally, the presence of adult monitors at the group's meetings, solely for the purpose of maintaining order, no more implies state approval of religion than does the provision of police or fire protection for church functions.

The students in this case are not asking for affirmative accommodation of religion; they ask only that student religious groups be treated in the same manner as any other student group. Their only request is that the state be neutral toward religion—a request fully in accord with the basic values of the First Amendment.

ARGUMENT

THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE PUBLIC SCHOOL AUTHORITIES TO EXCLUDE A VOLUNTARY, STUDENT-INITIATED AND STUDENT-RUN RELIGIOUS CLUB FROM AN ACTIVITIES PERIOD DURING WHICH OTHER STUDENT GROUPS ARE PERMITTED TO MEET

This case raises what has become one of the most hotly contested isues in the area of free speech and religion: whether high school students wishing to meet for purposes of voluntary, student-initiated, and student-directed religious discussions must be excluded from forums within the high school otherwise available to all. The question is whether the students *must be* excluded—

not whether they *may be* excluded—because the only reason respondent School Board has offered for excluding the students is their lawyers' advice that the Establishment Clause so commands. There is no issue regarding the propriety of school authorities limiting the school forum to curriculum-related discussions and activities, and thus no issue of the school authorities' control over the content of the curriculum. Rather, here as elsewhere, high school authorities have determined that the students would benefit from the opportunity to meet together for student-initiated, student-directed activities of their choice. J.A. 67, 90. Only because of the advice of their attorneys have they decided that they must restrict the subjects of their students' discussions. Pet. App. 66a.[8]

This case is therefore typical of so-called "equal access" cases elsewhere, in that the actual conflict is not between the students and the high school authorities. The conflict is between students and a view of the law—a view that equal treatment of religious speech in the high school setting would somehow violate the Establishment Clause of the First Amendment. As Congress found in its recent investigation into the issue, "many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity." S. Rep. 98-357, 98th Cong., 2d Sess. 6 (1984); accord, H.R. Rep. 98-710, 98th Cong., 2d Sess. 3 (1984). The reason, Congress found, is not "malevolence toward religion" but the administrators' "erroneous[ ] belie[f] that the Establishment Clause prohibits students from engaging in such speech at all, even when

---

[8] Neither the First Amendment nor the Equal Access Act limits the discretion of school officials in deciding whether to create a forum for free expressive activity. The Act simply provides that, if such a forum is created, the school may not "deny equal access or a fair opportunity" to students "on the basis of the religious, political, philosophical, or other content" of their speech (§ 802(a), 98 Stat. 1302). See *Police Dep't* v. *Mosley*, 408 U.S. 92, 96 (1972): "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."

other types of extracurricular student speech are permitted." S. Rep. 98-357, *supra*, at 6; accord, H.R. Rep. 98-710, *supra*, at 3, 4.

A. The Establishment Clause Does Not Authorize The Government To Single Out Religious Speech And Association For Direct Discriminatory Prohibition

The court below concluded unequivocally that "the students of Petros enjoy a free speech right to engage in religious activity" in this context (Pet. App. 36a; see *id.* at 11a-21a), but held also that "allowing such religious activity would violate the mandate of the Establishment Clause" (*id.* at 36a). In order to resolve this perceived "constitutional conflict of the highest order" (*ibid.*), the court of appeals engaged in an unprecedented constitutional cost-benefit analysis, "weighing the competing interests protected by each constitutional provision, *given the specific facts of the case*, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other" (*id.* at 40a (emphasis in original)). The court acknowledged that under this approach "some constitutional protections must unavoidably be abridged," but deemed its "role" as being to "maximize, as best as possible, the overall measure of the fundamental rights created by the Framers" (*ibid.*).

If there need be any "balancing" of interests at all (Pet. App. 11a), we submit that the court incorrectly balanced the constitutional interests involved in this case, elevating a highly speculative possibility of Establishment Clause injury over a concrete, selective, injury to petitioners' rights of free speech, association, and religious expression. We believe that the resolution reached by the district court (and by Congress) is plainly more neutral, administratively less entangling, and more protective of liberty than the courts of appeals' alternative. More to the point, if, as the court of appeals held, constitutional provisions applicable to this case are in "unavoidable tension" (Pet. App. 38a) and "present a close

question" (*id.* at 41a), there is no warrant for judicial intervention. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) ("we know of no principled basis on which to create a hierarchy of constitutional values"; a court cannot say that another provision of the Constitution is "in some way less 'fundamental' than the Establishment Clause"). If the court below is correct in its analysis of the problem, the proper conclusion is that there is no clear constitutional impediment to implementing the decisions of the elected government officials involved—Congress and the School Board.

More fundamentally, however, we submit that the court of appeals misperceived the relationship between the Establishment Clause and other provisions of the First Amendment. The First Amendment is not so strangely inharmonious that to enforce one provision is to violate another. The Establishment Clause, no less than the Free Speech or Free Exercise Clauses, was intended as a guarantee of liberty. By prohibiting an official orthodoxy, the Establishment Clause promotes "diversity and pluralism in all areas" (*Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8). It was not the intention of the drafters of the Establishment Clause to inhibit the creation of wide-open forums for discussion of ideas.

We begin with the proposition that religious expression, as a form of speech, is entitled to *no less* protection under the First Amendment than any other category of expression. *Widmar* v. *Vincent*, 454 U.S. 263, 269 & n.6 (1981); cf. *Healy* v. *James*, 408 U.S. 169 (1972). The great cases of this Court upholding the right of free speech frequently deal, not surprisingly, with speech of a religious nature. See *e.g.*, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943).

Indeed, religious expression and related aspects of religious practice are entitled in some contexts to pro-

tections that go *beyond* those extended to comparable forms of belief, either as a matter of legislative policy (see, *e.g.*, *Gillette* v. *United States*, 401 U.S. 437 (1971); *Zorach* v. *Clauson*, 343 U.S. 306 (1952)), or as a matter of constitutional law (see, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943)). "[T]he Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, slip op. 4. Cases of legislative accommodation can present difficult constitutional questions, with which this Court has had to grapple in recent Terms. See, *e.g.*, *Estate of Thornton* v. *Caldor, Inc.*, cert. granted, No. 83-1158 (Mar. 5, 1984); *Wallace* v. *Jaffree*, prob. juris. noted, No. 83-812 (Apr. 2, 1984); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). But there is not a single instance in which this Court has accepted the argument—though it has often been made—that because of the Establishment Clause or related policy considerations a unit of government is justified in singling out religious speech for discriminatory suppression. See, *e.g.*, *Widmar* v. *Vincent*, *supra*; *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); see also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *McCreary* v. *Stone*, 739 F.2d 716 (2d Cir. 1984), aff'd by an equally divided Court, No. 84-277 (Mar. 27, 1985); *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979).[9]

The drafters of the Bill of Rights had no intention to place religionists or religious speech under any special

---

[9] This should be distinguished from the more difficult question of when, or whether, an individual beneficiary's use of tax-supported governmental financial assistance may be restricted because of the religious implications of the expenditure. See, *e.g.*, *Witters* v. *Washington Comm'n for the Blind*, cert. granted, No. 84-1070 (Apr. 1, 1985). In such cases, the interests of other persons—the taxpayers—in not being coerced into supporting activities of a religious nature must be considered. There are no such third party interests here.

disabilities, even within the public arena. See *McDaniel* v. *Paty*, 435 U.S. at 641 (Brennan, J., concurring). Indeed, it is no exaggeration to state that the result below is *directly contrary* to the orginal intent, and that it interprets the Establishment Clause in a manner expressly feared and sought to be avoided by its drafters. The principal point of criticism of the early drafts of the Establishment Clause by members of the First Congress was that it might be interpreted in a way that would be "extremely hurtful to the cause of religion." 1 Annals of Congress 758 (Aug. 15, 1789 (J. Gales ed. 1834)) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). The response of James Madison, principal author of the draft Amendment, was that "the object it was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform" (*id.* at 758-759; see also *id.* at 758). A policy of equal access for all groups is precisely the ideal envisioned by the Founders. An exclusion of religious groups from a forum otherwise open to all offends the very core of the First Amendment. *Widmar* v. *Vincent, supra; Niemotko* v. *Maryland, supra;* see generally M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 6-17 (1978).

This case does not require the Court to explore the limits of affirmative accommodation of religion; the student petitioners ask only that they be treated in the same way as any other student group. See *Widmar* v. *Vincent*, 454 U.S. at 273 n.13. They seek tolerance, equal treatment, nondiscrimination. The Establishment Clause does not authorize—and the Free Speech Clause prohibits—the singling out of religious speech for direct discriminatory prohibition.

These principles are relatively well-settled in most contexts; however, their application in the high school setting has divided and perplexed the lower federal

courts.[10] The special character of the public schools warrants special sensitivity to potential Establishment Clause problems in that setting. However, the reasons that have been offered for denying to these petitioners—these high school students—First Amendment protections they would receive as adults in other public settings (*Widmar* v. *Vincent, supra*), and indeed as high school students if their speech were of a different, secular, sort (see pages 19-20, *infra*) are not persuasive.

B. The Presumed Greater Impressionability Of High School Students Is Not A Basis For Permitting Discrimination Against Religious Speech

Widmar v. *Vincent, supra,* is the paradigm from which all discussions of the issue in this case begin. If *Widmar*, which arose in a university setting among university students, is applicable as well to a high school setting and high school students—a question impliedly left open in *Widmar* (454 U.S. at 274 n.14)—then petitioners' free speech claim is irrefutable and no Establishment Clause obstacles exist that might preclude vindication of their rights. The court of appeals acknowledged (Pet. App. 25a) that "[a]ll" of the considerations distinguishing this case from *Widmar* "are an outgrowth of the differences between a high school and a university." Principal among those differences, according to the court of appeals, is the different "maturity and impressionability" of high school students. That is, high school students "would be less able to appreciate the fact that

---

[10] Compare *Brandon* v. *Board of Education,* 635 F.2d 971, 978 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District,* 669 F.2d 1038, 1045-1046 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983); and the decision below, with *Nartowicz* v. *Clayton County School District,* 736 F.2d 646, 649 (11th Cir. 1984); *Amadei* v. *Spring Branch Independent School District,* No. H-84-4673 (S.D. Tex. Apr. 26, 1984) (bench ruling); *Bell* v. *Little Axe Independent School District No. 70,* No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), appeal docketed, No. 83-1458 (10th Cir. Apr. 5, 1983); and *Reed* v. *Van Hoven,* 237 F. Supp. 48 (W.D. Mich. 1965).

permission for Petros to meet would be granted out of a spirit of neutrality toward religion and not advancement." *Ibid.* We submit that this conclusion is based on faulty empirical assumptions and cannot withstand analysis.

1. The notion that high school students are too impressionable to understand that the school's neutral treatment of a religious club would not constitute official endorsement of religion was investigated in detail by Congress in its consideration of the Equal Access Act. An express congressional finding that high school students are mature enough to understand the difference between school accommodation and school endorsement of religion was the premise of the Act's prohibition on public secondary schools with "limited open forums" excluding activities on the basis of their religious content.

The Senate Report on the legislation stated: "[t]he Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led, religious speech on the one hand and student-initiated, student-led religious speech on the other." S. Rep. 98-357, *supra*, 35; see *id.* at 9-10. This "exercise of [the Committee's] fact-finding powers" (*id.* at 9) was based in part on the expert views of psychologists (*id.* at 35), and in part on the testimony of many witnesses, including high school students (*id.* at 10).[11] Supporters of the legislation in the House

---

[11] For example, a high school student from Sonoma, California testified:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 64 (1983) (testimony of Sarah Scanlon). Another student, from Lubbock, Texas, testified:

> Some people are worried that high school students are very impressionable, and that we can't make decisions and that we

expressed a similar view.[12]

Where Congress has made findings of fact in the discharge of its legislative function, due regard for the separation of powers and for the ability of the legislature to gather information and analyze issues of legislative fact requires that courts defer to congressional determinations, even for purposes of constitutional adjudication, unless those determinations can be said to be irrational. See, *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Rostker* v. *Goldberg*, 453 U.S. 57, 74, 80-83 (1981); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 136, 138-139 (1968); *Katzenbach* v. *Morgan*, 384 U.S.

---

are naive. I feel that that is pretty naive on the part of the people who think that. I don't think that is true at all.

Id. at 60 (testimony of Bonnie Bailey). See also, *e.g.*, *ibid.* (testimony of Lisa Bender); *Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 39 (1983) (testimony of C. Luke Thornton, Principal of John I. Leonard High School, Lake Worth, Fla.).

[12] See, *e.g.*, 130 Cong. Rec. H7727 (daily ed. July 25, 1984) (remarks of Rep. Roukema) (disputing claim that "allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students" and stating that "studies of adolescent psychology * * * have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures he depended upon as a younger child"); *id.* at H7724 (remarks of Rep. Frank) ("I regard this as a very auspicious day [for] * * * those of us who think we ought not infantilize teenagers."). These views reflect the conclusions of a recent survey of the psychological literature, which concluded that "[g]iven the increased cognitive capacity and the psychological separation between the self and authority figures that occurs during adolescence, high school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear—even more clear, perhaps, than in later stages of life." Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983) (citing psychological studies).

641, 653 (1966); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94-95 (1961). As Justices Brennan, White, and Marshall stated in their concurring and dissenting opinion in a case involving a similar question—the maturity of 18-21 year olds—*Oregon* v. *Mitchell*, 400 U.S. 112, 247-248 (1970) (citations omitted): "[T]he nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.'" Cf. *Katzenbach* v. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting) ("[t]o the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect").

Particularly in this case, where the court of appeals' conclusions regarding student immaturity were based on pure speculation, and where the district judge came to a contrary factual conclusion, the Congressional findings—based as they were on actual testimony—should carry considerable weight.

2. There is a curious inconsistency between the decision below and decisions involving the First Amendment rights of high school students regarding non-religious matters. See, *e.g.*, *Board of Education* v. *Pico*, 457 U.S. 853 (1982) (plurality); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Seyfried* v. *Walton*, 668 F.2d 214, 219-220 (3d Cir. 1981) (Rosenn, J., concurring); *Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973). These decisions presuppose that high school students are capable of learning from exposure to a diversity of viewpoints, without confusing free expression with official orthodoxy.[13] Thus, school au-

[13] In *Tinker*, this Court held that schoolchildren had a First Amendment right to wear black armbands while in school as a

thorities have been prohibited from censoring the expression of controversial views by teachers and school-sponsored newspapers—situations in which there is a much greater risk than in the present case of the views being imputed to the school itself. *James* v. *Board of Education*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972) (teacher wearing black armband in classroom to protest Vietnam War); *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731, 736-737 (E.D. Va.), aff'd, 564 F.2d 157 (4th Cir. 1977) (article in school newspaper entitled "Sexually Active Students Fail to Use Contraceptives"); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (Table) (school newspaper with information on birth control); *Shanley* v. *Northeast Indep. School Dist.*, 462 F.2d 960, 970-972 (5th Cir. 1972) (school newspaper with articles on drugs and birth control).

There is surely no reason to assume that expression of religious views will play any more powerfully upon the imagination of high school students than such subjects as sex, drugs, or political activism. If students are able to perceive that their peers' opinions on sexuality or military conscription are not those of the school administration, the same will be true of their peers' opinions on religion.

3. If high school students (unlike college students) would construe approval of a religious club's request for permission to meet as endorsement of religion, why would they not also construe disapproval of the application as official hostility to religion—a result equally at variance with the Establishment Clause? The district judge in this case concluded that a policy of singling out religious

---

symbolic protest to the Vietnam War. Testifying in support of equal access legislation, Professor Laurence Tribe commented: "no conceivable principle of distinction can suggest that students who have a right to wear black armbands to protest the war suddenly lose that right if they utter the name of God in the process, or if, heaven forbid, they should do it as a group instead of single file." *Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 47 (1984).

groups for exclusion from the school's activities period could well be viewed by the students as manifesting official hostility toward religion. Pet. App. 97a.

Respondent School Board itself apparently recognized that its action might be construed as hostility toward Petros' religious character. The letter from the Board to the students explaining the decision included the following (Pet. App. 6a; J.A. 48-49):

> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

It is not surprising that the Board apprehended that the students might construe its action as indicating that the group was "unworthy," since, as the court of appeals noted (Pet. App. 8a), Petros is the only proposed student club or activity ever denied the right to participate in the school's activities period during the memory of the principal. J.A. 75.

The impression of state hostility to religion caused by exclusion of religious groups is not unique to this case. In its consideration of the Equal Access Act, Congress heard testimony to that effect from students, and found that many students have in fact perceived their schools' refusal to allow religious activity as manifesting discrimination and official hostility. The Senate Committee concluded that "students reasonably perceive the denial of access for religious speech as State hostility toward religion" (S. Rep. 98-357, *supra*, at 36), and stressed that "[t]he perception of State hostility is not a speculative one created by the Committee, but one held by students as evidenced by the testimony of the students themselves." *Id.* at 11, 19-20.

If it were true that high school students are too immature to appreciate the difference between neutral school actions and endorsement of (or hostility toward) religion, then school officials could not avoid violating the Establishment Clause, whether they granted or denied a

request for equal access. *Any* action on a religious group's request for permission to meet would convey a state position regarding the merits of religion, according to this view. The only way out of the dilemma would be for the school to close its limited public forum—that is, to forbid any voluntary student activities on school property. Surely the Constitution does not require such a result.

4. The court of appeals appeared to place great weight on its view that "nonconforming students" might be "ostracize[d]" or "stigmatize[d]" by the Petros meetings, because of the force of "peer pressure inherent in a high school environment" (Pet. App. 44a). Accord, *Brandon* v. *Board of Education*, 635 F.2d at 978. We would note, however, that there is absolutely no evidence in the record that any student at Williamsport High School has felt pressured or coerced into joining Petros, as opposed to participating in any of the other 25 student groups authorized to meet at the same time. Indeed, Petros, alone of the student organizations, has agreed to eschew various forms of school publicity—inclusion in the yearbook and school newspaper and access to the public address system—that might be viewed as instruments of "peer pressure." The fact that Petros has never attracted more than 45 students (out of 2500) makes the court of appeals' hypothetical concerns seem quite overstated.[14]

More troubling as a legal matter is the court of appeals' unstated assumption that, in this context, the Establishment Clause operates to restrain individuals—and not just governments—from propagating their beliefs.

---

[14] Indeed, the court of appeals' unexamined assumptions regarding the peer pressures actually experienced by students at a modern high school may be unrealistic. One of the powerful motivating factors for the formation of a group like Petros, as one member told a Senate subcommittee (*Equal Access: A First Amendment Question, supra*, at 44 (testimony of Lisa Bender)), is the need of religiously-oriented students to "know[] that other students were behind you in what you believed." To permit so-minded students to meet together may well be a means for helping them to withstand peer pressure of a different and more powerful sort.

As the district court noted (Pet. App. 91a), "[a]ny advancement of religion would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity." The neutral provision of a forum—a meeting place—does not somehow transform the private conduct of the students into an establishment of religion.

Moreover, if "peer pressure" is the problem, preventing Petros meetings is no solution, for Petros is simply a gathering of like-minded individuals who wish to engage in prayer, Bible study, and related discussion. To prevent "peer pressure" would require the rigorous suppression of speech and discussion during occasions when Petros members interact with *other* students—in the hallways, on the playing field, at lunch. This the Constitution would plainly not countenance. The solution, instead, is for the government neither to endorse nor to suppress free expression—to adopt a policy of neutrality and pluralism, not of secularism and censorship. It was, after all, in the context of public high schools that this Court made its famous pronouncement (*Zorach* v. *Clauson*, 343 U.S. at 313): "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."

C. There Is No Other Basis For Distinguishing This Court's Decision In *Widmar* v. *Vincent*

The court of appeals cited several additional grounds for not applying the teaching of *Widmar* v. *Vincent*, *supra*, in this setting. None of these has merit.

1. *Compulsory attendance laws.* Compulsory attendance laws may necessitate some limitations on the speech and conduct of teachers and school officials that might take advantage of the "captive audience" of public school students. But they provide no basis for limiting voluntary, student-initiated speech by the students themselves. So long as the students may freely choose among a wide

range of activities and topics, there is no compulsion. Indeed, the court of appeals itself acknowledged (Pet. App. 18a):

> [T]he activity period at Williamsport Area High School provides a forum for self-expression, by which students exercise their own discretion in deciding which organization, if any, to support. Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.

Students at the Williamsport High School who wish to attend meetings of Petros must affirmatively choose to do so. Thus, this case is entirely different from situations in which the school provides a captive audience for religious speech, requiring students who wish not to participate to take affirmative steps to avoid it. See *Goodwin* v. *Cross County School Dist. No. 7*, 394 F. Supp. 417, 425-427 (E.D. Ark. 1973) (violation of Establishment Clause when students permitted to read Bible verses and recite prayer to captive classroom audience); *Collins* v. *Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.), cert. denied, 454 U.S. 863 (1981) (violation of Establishment Clause when students permitted to recite prayer at school assembly; students not wishing to attend assembly could report to study hall).

The answer to the court of appeals' argument here is no different from that supplied by this Court in a similar context in *Zorach* (343 U.S. at 311 (footnote omitted)):

> There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students [who] so request.

2. *Location of the meetings.* The court of appeals also distinguished this case from *Zorach* and *Widmar* on the ground that the meetings took place on school property in a more controlled environment than a university. Pet.

App. 25a-26a, 27a.[15] Therefore, the court concluded, "involuntary contact between nonparticipating students and religious groups is inevitable. Students of differing or conflicting creeds would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities * * *." Pet. App. 26a, 28a.

However, the meetings of the religious group involved in *Widmar* also took place on school property, in university classrooms and in the student center (454 U.S. at 265 n.2). The Williamsport Area High School is located on a 147-acre campus and has 2,500 students—a size comparable to many smaller college campuses. More than 25 clubs have received permission to meet during the activities period (J.A. 103-104), in addition to other competing activities (homeroom, computer station, career counseling, and library), as compared to some 100 clubs in *Widmar* (not necessarily all meeting at the same time). In addition, the club in this case has agreed to forego use of school bulletin boards and other organs of publicity (a restriction not undertaken in *Widmar*). In short, there is no constitutionally significant difference between the visibility of Petros and the club involved in *Widmar* or similar clubs at other college campuses.

On this point, the court of appeals relied heavily (Pet. App. 27a-28a, 31a) on *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), in which this Court held unconstitutional a program in which religious classes were taught on the premises of public schools by clergymen of various faiths; students who did not choose to participate could attend study hall. However, *McCollum* is distinguishable on several grounds. First, the program in *McCollum* singled out religion for special treatment,

---

[15] The opinion below states that the club meetings "would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes" (Pet. App. 26a). In fact, the record shows that the club met in the school cafeteria. J.A. 53; Pet. App. 107a.

while here the students desire only rights equal to those accorded others. As this Court stated in *Widmar*, 454 U.S. at 272 n.10 (emphasis in original):

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, *e.g.*, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

Second, as the district court observed (Pet. App. 95a), participation in the *McCollum* program was only "nominally voluntary"—like that in the school prayer cases—because students were "placed in two categories, *i.e.*, those taking religious instruction and those who were not." Here, in contrast, the religious club is only one of numerous alternative activities. The wide range of choice is a guarantee against subtle coercion. Finally, the religious program in *McCollum* was organized and operated by the school authorities, while here the club was organized and run by students themselves, totally at their own initiative. Thus, while in *McCollum* there was state sponsorship, here there is only free exercise and association.

3. *Presence of adult monitor.* The court of appeals concluded (Pet. App. 26a-27a) that the required presence of an adult monitor "necessarily must impart the impression to students that the school's authority and that the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school." However, the record makes clear that the only function of the monitor is to take attendance and to maintain order. The district court correctly concluded that "[i]nasmuch as the teacher would be present only to ensure orderly meetings, the instant situation would involve no more entanglement than when a state provides for 'the safety, security and general convenience' for persons attending the celebration of a Mass at the National Mall;

or provides police and fire protection to a church" (Pet. App. 99a-100a (footnote and citations omitted)).

4. *Excessive entanglement.* The court of appeals concluded that the club's commitment not to use the school's newspaper, bulletin boards, or public address system—a commitment not made in *Widmar*—would entail "excessive entanglement" (Pet. App. 33a-34a).[16] However, this purported distinction is based on a misunderstanding. The court of appeals apparently viewed the students' commitment as distinguishing between "religiously oriented material" and other announcements (*id.* at 33a); this would require the school officials "to interpret the posted announcements in order to distinguish religious from non-religious content" (*id.* at 34a). However, the club's commitment was to forego *all* use of the bulletin board, public address system, or newspaper to publicize their meetings—a commitment which, as Judge Adams observed (*id.* at 59a), "represents a simple, easily-administered rule" that does not require the school authorities to distinguish religious from non-religious content.

Indeed, as Judge Adams also observed, enforcing a ban against religious meetings could prove to be far more "entangling" than a policy of equal access (Pet. App. 59a). See *Walz* v. *Tax Commission*, 397 U.S. 664, 674-675 (1970) (granting tax exemptions to churches gives rise to lesser government involvement than would taxing them); *Cantwell* v. *Connecticut*, 310 U.S. at 305 (requiring official determination of what is and what is not a "religion" violates First Amendment). For example, as-

---

[16] Other courts have also found that permitting student religious group meetings would involve excessive entanglement. *Lubbock Civil Liberties Union* v *Lubbock Independent School District*, 669 F.2d 1038, 1047 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983); *Brandon* v. *Board of Education*, 635 F.2d 971, 979 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); *Johnson* v. *Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 14, 137 Cal. Rptr. 43, 50-51 (1977); see also *Nartowicz* v. *Clayton County School Dist.*, 736 F.2d 646, 649-650 (11th Cir. 1984).

sume that the students involved in Petros, or other students of a known religious orientation, were to form a Philosophy and Ethics Club. How could the school be sure that this club was not a "cover" for religious meetings? Presumably the adult monitor would have to keep a close and continuous watch over what the students said and did at each meeting to "determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove to be an 'impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Widmar*, 454 U.S. at 272 n.11 (citation omitted). In essence, the school would have to assume a continuing role of religious censorship over such a club's meetings—a role inimical to the values of the First Amendment.[17]

This provides further reason to believe that "benevolent neutrality" toward religion (*Walz* v. *Tax Commission*, 397 U.S. at 669) is to be preferred over a "brooding and pervasive devotion to the secular" (*Abington School District* v. *Schempp*, 374 U.S. 203, 306 (1963)

---

[17] Compare the remarks of Senator Levin in support of the Equal Access Act:

> The status quo right now is that we have State officials who are making this determination as to what constitutes religious activity, what is a religion, what is a religious speech. That is not something which I am particularly happy having State officials doing, yet they are doing it right now because many attorneys representing many school boards have told the school boards, and their administrators that there cannot be a religious meeting * * *.
>
> * * * * *
>
> [S]chool officials are now being forced to make difficult decisions each time students request to meet when the subject of the meeting could be religion. For example, if a student-initiated group requests the use of school premises to talk about "moral issues," school officials would have to make further inquiries before granting the request. Will the group be discussing philosophy or theology? If the students plan to talk about religion, should the school deny the request?

130 Cong. Rec. S8354, S8355 (daily ed. June 27, 1984).

(Goldberg, J., concurring)). We suspect that the court below was so concerned that religious influences not be felt in the public high school that it simply lost sight of the wider issues of religious liberty.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CHARLES FRIED
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

MAY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10217